Part VI Key Issues in Times of Armed Conflict, Ch. 28 Armed Conflict and Forced Migration: A Systemic Approach to International Humanitarian Law, Refugee Law and Human Rights Law

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Chapter 28  Armed Conflict and Forced Migration

A Systemic Approach To International Humanitarian Law, Refugee Law and Human Rights Law

1 Introduction

Although armed conflicts constitute the main cause of forced migrations, the applicable normative framework is plagued by recurrent ambiguities and controversies. Three decades ago, Dinstein asserted that ‘in its present form international law does not deal in a systematic fashion with the whole spectrum of the problem of refugees in armed conflict. […] Still there are several provisions relevant to the issue which are dispersed in various legal instruments’. These instruments are scattered throughout three main branches of international law: international humanitarian (p. 701) law, refugee law, and human rights law. Their concurrent applicability in times of armed conflict is arguably both the solution and the problem. On the one hand, the great variety of applicable instruments reflects the multifaceted dimensions of forced migration and its cross-cutting character. On the other hand, such a fragmentation undermines the understanding and cogent application of the existing legal norms.

While sharing the same purpose of protecting individuals against abuses, international humanitarian law, refugee law, and human rights law have largely evolved around their own specific sources, institutions, and ethos. Meanwhile, the academic literature has mainly focused on the interfaces between refugee law and humanitarian law to the detriment of a more holistic approach, thereby excluding human rights law as a source of refugee protection in armed conflict.

Scholars’ discussions about the applicable legal regime have been further biased by the natural temptation of specialists to celebrate the virtues of their own discipline. Humanitarian and refugee lawyers have thus been keen to highlight the centrality of their respective fields by relying ironically on the same argument: lex specialis (p. 702) derogat lex generalis, though they are not always clear about the exact meaning and impact of this maxim. From a systemic perspective, this superficially attractive maxim is, however, too simplistic to provide a cogent and predictable frame of analysis. It raises more questions than it actually solves for two main reasons. First, resort to lex specialis presupposes a conflict of norms which proves to be extremely rare between international humanitarian law, human rights law, and refugee law. As will be shown later, when this arises, such a conflict is resolved in favour of the most protective treatment essentially provided by human rights law, without regard to the alleged speciality of the prevailing norm. Secondly, the lex specialis maxim says nothing about what should be ‘general’ or ‘special’, and how to interpret these vague terms. The subjectivity inherent to such assessment is exemplified by the contradictory interpretations raised by the position of the International Court of Justice on this issue. There are now as many possible criteria for determining the special or general nature of a particular norm as the number of authors undertaking such an exercise. Some attempt to combine the precision of a norm with the ‘systemic goals of the international legal order’, whereas others encapsulate ‘the operation of lex specialis as an aspect making pragmatic judgements about relative “generality” and “speciality”, about what is “normal” and what “exceptional”’. 
Given the weakness of this approach, the normative interaction between international humanitarian law, refugee law, and human rights law is more convincingly understood through the complementarity approach as notably endorsed by the United Nations (UN) Human Rights Committee. This last approach differs from the \textit{lex specialis} approach in two essential respects. It first posits the cumulative application of overlapping norms on a same-subject matter, instead of the exclusive application of one specific norm overriding another. This approach favouring the simultaneous application of humanitarian law, refugee law, and human rights law is more in line with the prevailing interstate practice. Alongside the General Assembly, and the Human Rights Council, the Security Council has steadily reaffirmed that ‘parties to armed conflict comply strictly with the obligations applicable to them under international humanitarian, human rights and refugee law’.

The second key difference with the \textit{lex specialis} approach relies on the criteria to be used in resorting to the complementarity approach. Reflecting the ultimate objective of these three branches of international law, the cumulative application of humanitarian law, refugee law, and human rights law requires the most protective norm to be implemented. The most favourable treatment further constitutes a well-established feature of both human rights law and refugee law. While this last principle is also occasionally endorsed by some provisions of humanitarian law, the Martens Clause is apt to play a similar function.

From this angle, a strict compartmentalization of the three branches of international law is artificial and even counterproductive for the purpose of ensuring effective protection. Contrary to the common belief of many humanitarian and refugee law specialists, the most specific norm is not always the most protective one. In fact, rather the contrary is true. The present Chapter will show that the complementarity approach not only constitutes the most cogent frame of analysis for capturing the multifaceted interactions between humanitarian law, refugee law, and human rights law. It also paves the way for a human rights-based approach to armed conflicts.

Three scenarios are identified in this Chapter: (i) refugees in war, (ii) refugees fleeing war, and (iii) refugees in post-war contexts. For each scenario a comparative assessment of the three branches of international law comes to the same conclusion: while humanitarian and refugee law still play a non-negligible role, they are not the panacea in terms of protection. By contrast, human rights law fulfils the central function of filling the gaps in protection left by humanitarian and refugee law.

\section{Refugees in War}

Refugees caught in armed conflicts represent an archetypal case for testing the potential of the complementarity approach. The overlapping between international humanitarian law, refugee law, and human rights law is not disputable in this particular situation and their cumulative application reveals some unexpected conclusions. Although international humanitarian law is supposed to be the main branch of international law applicable in times of armed conflict, closer scrutiny of its specific norms proves rather frustrating (Section A). Indeed, international humanitarian law has little to provide for protecting the specific needs of refugees caught up in armed conflicts. The simultaneous application of refugee law and human rights law accordingly proves to be a crucial source of protection (Section B).

\subsection*{A. International humanitarian law and the limits of protection}

The impact of international humanitarian law on the refugee protection regime is particularly complex and ambiguous. On the one hand, its primary function in the field of forced migration is a preventive one. The explicit prohibition of forced displacement aims to prevent civilians from becoming refugees. On the other hand, international humanitarian
law is relatively indifferent to the specific needs of refugees who are in the territory of a party to an armed conflict.

Among the 576 articles of the Geneva Conventions and their Protocols, only three provisions explicitly refer to refugees. Furthermore, all of them are exclusively applicable in times of international armed conflict and occupation. By contrast, international humanitarian law does not contain any specific provision on refugees in non-international armed conflicts despite these representing the majority of armed conflicts around the world. Neither Common Article 3 of the Geneva Conventions and AP II, nor the International Committee of the Red Cross (ICRC) Customary Study specifically addresses refugees. This curious omission does not mean that refugees are left without protection by international humanitarian law. (p. 705) They are still protected as civilians provided they are not directly participating in hostilities. Nevertheless, besides the general protection of the civilian population as a whole, refugees are not conceived by international humanitarian law as persons in need of specific protection in non-international armed conflicts.

Even in international armed conflicts, international humanitarian law still apprehends refugees through the particular prism of its own concepts and categorization schemes. From this angle, the distinction between combatants and non-combatants is one of ‘the cardinal principles […] constituting the fabric of humanitarian law’. Though it is frequently assumed that ‘one cannot be a refugee and a fighter at the same time’, this question remains open both in law and practice. It even constitutes the prerequisite for identifying the relevant applicable norms under international humanitarian law.

Refugees may fall within the definition of ‘combatant’ under Article 4 of GC III as supplemented by Article 43(1) of AP I, when they belong to a party to the conflict—other than their country of origin—fighting against the latter or any other states. If not, refugees are civilians and accordingly benefit from the protection against the effect of hostilities. The crux of the matter is then whether refugees are ‘protected persons’ under international humanitarian law. There is, however, no unequivocal answer to this question. International humanitarian law instead provides a piecemeal frame of protection which depends on a complex set of various factors, including the ratification of AP I, the nationality of refugees, and the time of their arrival on the territory of states parties. While some are protected persons under AP I, the great majority of refugees caught in international armed conflicts are not covered by this last instrument. In such a case, they must accordingly fulfil the ordinary conditions required by international humanitarian law to be considered as protected persons.(p. 706)

(i) Refugees as protected persons under AP I

The question whether refugees are as such ‘protected persons’ remained surprisingly unclear until 1977 with the adoption of AP I. Its Article 73 explicitly acknowledges that refugees are protected persons ‘within the meaning of Parts I and III of the Fourth Convention, in all circumstances and without any adverse distinction’. As protected persons, they benefit from a substantial range of fundamental guarantees, including most notably the right to leave, the grounds and procedures governing their internment or assigned residence, as well as protection against deportation and forcible transfer.

However, Article 73 subordinates their status of protected persons to the fulfilment of two cumulative conditions. First, they must have been recognized as refugees ‘under the relevant international instruments accepted by the Parties concerned or under the national legislation of the State of refuge or State of residence’. The relevant international instruments obviously include the Geneva Convention relating to the Status of Refugees as amended by its Protocol, the Organization of African Unity (OAU) Convention governing the Specific Aspects of Refugee Problems in Africa, and the European Union Qualification
Directive. According to the ICRC Commentary, they also cover non-binding resolutions, including notably the 1984 Cartagena Declaration on Refugees. The second condition required by Article 73 to be recognized as a protected person is much more significant and restrictive: they must have been considered as refugees ‘before the beginning of hostilities’. Those who have become refugees after the outbreak of hostilities, and most probably because of them, are thus excluded. From a refugee protection perspective, this represents the major shortcoming of international humanitarian law which has been criticized as introducing ‘an arbitrary and unnecessary distinction, in direct contradiction to the humanitarian principles of protection of the Geneva Conventions’. (p. 707)

Such a difference in treatment between those recognized as refugees before the beginning of hostilities and those recognized after is apparently based on the fear of many states that a more protective role would encourage desertion and treason. The rationale behind such far-reaching exclusion is, however, not convincing for two main reasons. First, the alleged risk of desertion is hardly relevant since refugees must be civilians to be considered as protected persons under GC IV as supplemented by Article 73. Secondly, it is precisely when civilians are fleeing their own country because of hostilities that the need for protection is at its greatest.

(ii) Refugees as non-nationals of a party to the conflict

If refugees do not fulfil the conditions imposed by Article 73, or if they are in the hands of a state not party to AP I, they may fall under the general definition of protected persons contained in Article 4 of GC IV. This last provision covers most—but not all—refugees once they are ‘in the hands of a Party to the conflict or Occupying Power of which they are not nationals’. In such cases, they will benefit from the full range of guarantees contained in GC IV as well as the specific protection granted by Article 44. This last provision acknowledges that refugees who are by definition not protected by their state of origin cannot be treated as an ‘enemy alien’ because they simply have the nationality of the other party to the conflict. Article 44 thus mitigates the traditional criterion of nationality, which determines the applicability of GC IV, in order to take into account the particular situation of refugees.

Though limited to nationals of the other state party to an international armed conflict, the rationa personae scope of Article 44 is more inclusive than Article 73 of AP I. Contrary to the latter, the former is not confined to those who were recognized as refugees before the beginning of hostilities, but also covers those who fled their own country during the conflict. Furthermore, Article 44 retains a broad and factual definition of the term ‘refugee’ as referring to all nationals of an enemy state ‘who do not, in fact, enjoy the protection of any government’. It is thus not limited to the refugees under the UN Convention relating to the Status of Refugees which was adopted two years after GC IV and then amended in 1967 by the New York Protocol. Article 44 also includes beneficiaries of other complementary forms of protection in the state of asylum, whether such protection is based on its domestic law or other international instruments.

However, the potentially significant number of persons covered by Article 44 is undermined by the vague and permissive obligation contained therein. As confirmed by the drafting history, the ICRC Commentary, and the legal doctrine, the provision’s loose wording recommends that belligerents do not consider refugees as enemies exclusively because of their nationality. The Detaining Power thus retains a particularly broad discretion in considering whether or not refugees should be treated as enemy nationals. Hence, Article 44 does not prevent the Detaining Power from taking security measures, such as internment, against refugees who are considered as a danger to its own security.
Refugees as nationals of neutral, co-belligerent, or occupying state

The general definition of ‘protected persons’ under GC IV does not include all refugees who are non-nationals of a party to an international armed conflict. Article 4(2) explicitly excludes nationals of a neutral or co-belligerent state which has ‘normal diplomatic representation’ in the belligerent state on whose territory they are located or nationals of a co-belligerent state with diplomatic relations with the occupying state in whose hands they are. In such cases, refugees who have fled from neutral or co-belligerent states will only benefit from the general protection afforded to the civilian population, unless the concerned state has ratified AP I and the refugees have been recognized as such before the outbreak of the hostilities.

Furthermore, nationals of an Occupying Power who are in the territory of the occupied state are not covered by the definition of protected person because Article 4 is circumscribed to non-nationals. Though not considered as protected persons, refugees who are nationals of the Occupying Power are specifically addressed by Article 70(2) of GC IV. The wording of this last provision is again not a model of clarity and needs to be quoted in extenso:

Nationals of the Occupying Power who, before the outbreak of hostilities, have sought refuge in the territory of the occupied State, shall not be arrested, prosecuted, convicted or deported from the occupied territory, except for offences committed after the outbreak of hostilities, or for offences under common law committed before the outbreak of hostilities which, according to the law of the occupied State, would have justified extradition in time of peace.

(p. 709)

Article 70(2) is the only provision in the whole Fourth Geneva Convention which explicitly applies to nationals of a state party to an international armed conflict. Such a departure from the traditional stance of international humanitarian law remains nevertheless in line with the general duty of the Occupying Power to respect the laws in force in the occupied country. As stressed by the ICRC Commentary, the rationale of Article 70(2) ‘is derived from the idea that the right to asylum enjoyed by them [ie refugees] before the occupation began must continue to be respected by their home country, when it takes over control as Occupying Power in the territory of the country of asylum’.

However, the protection granted by international humanitarian law should not be overestimated. Article 70(2) suffers from three main drawbacks. First, the prohibition expressed in this provision is limited to some specific measures only: arrest, prosecution, conviction, and deportation. As observed by Dinstein, it says nothing about the other measures which may be taken against refugees (such as confiscation of property or denial of religious freedom). This represents a considerable lacuna where Article 73 of AP I does not apply.

Secondly, similarly to Article 73 of AP I, Article 70(2) of GC IV is confined to refugees who reached the occupied territory ‘before the outbreak of the hostilities’. This rationae temporis qualification creates a dangerous protection gap. Indeed, nationals who fled from their own country during a conflict are the most vulnerable to acts of revenge by their state of origin when the latter occupies the territory of the asylum state. States’ obsession not to encourage desertion and treason is further confirmed by this last limitation.

Thirdly, the prohibition contained in Article 70(2) is not absolute. It may be exposed to two significant exceptions which reflect the conflicting interests at stake. First, refugees can be arrested, prosecuted, convicted, and deported for non-political offences committed before the hostilities, provided that these offences would have justified extradition in time of peace under the law of the occupied territory. This subtly qualified exception endorses the
traditional distinction made in refugee law between ordinary criminals and refugees.\textsuperscript{39} It is aimed at ensuring that refugees are not sanctioned for the reasons they have fled their own state when it becomes (p. 710) the Occupying Power. However, the risk of abuse is still apparent since Article 70(2) says nothing about the procedure to be followed, and in particular whether this is up to the Occupying Power or the occupied authorities to interpret and apply the conditions laid down therein.

The other exception is even more straightforward, as it refers to any ‘offences committed after the outbreak of hostilities’ without any other qualifications. From the angle of international humanitarian law, the refugee is still considered as a national of the Occupying Power. He retains, as such, some duties of allegiance towards his own country in times of armed conflict and must abstain from activities which may be construed as treason.\textsuperscript{40} In an echo of the concern of states, the ICRC Commentary assumes that ‘once war has broken out, […] the higher interest of the State take precedence over the protection of individual’.\textsuperscript{41}

As exemplified by Article 70(2), the reach of international humanitarian law is equivocal to say the least. Overall, while providing a vital protection to civilians, it has little to offer to refugees as a specific group of concern. Refugee protection under international humanitarian law thus remains incomplete and fragmented. Under both treaty and customary law, international humanitarian law offers no specific protection to refugees caught in non-international armed conflicts. Even in international armed conflict, it does not provide a tailored, specific, and comprehensive regime of refugee protection. International humanitarian law attempts instead to encapsulate refugees within its own notion of protected persons. By doing so, it gives the impression of trying to resolve a problem it has itself created.

More fundamentally, enclosing refugees under the generic label of protected person fails to address their specific needs. On the one hand, the definition of protected persons under international humanitarian law does not include all refugees and other persons in need of protection. Beside the cases mentioned before, it excludes all nationals of a belligerent state who flee to a state that is not a party to the conflict during and/or because of the hostilities. On the other hand, even if refugees correspond to the definition of protected persons, they benefit as such from the same guarantees as ordinary aliens within the territory of a party to the conflict. As demonstrated above, the only two provisions specifically devoted to refugees in GC IV are conspicuously weak and ambiguous.

B. International refugee law and human rights law as a vital source of protection in armed conflicts

Because of the limited protection offered by humanitarian law, refugee law and human rights law are bound to play essential roles. This is not only the case in (p. 711) non-international armed conflicts but also in international armed conflicts, where refugees are not protected persons under international humanitarian law or, even when they are, because of the relative lack of a tailored and specific protection granted by this last branch of international law. The concurrent application of refugee law and human rights law highlights the crucial importance of the complementarity approach for ensuring effective protection in armed conflicts. The reach and degree of protection offered by the two branches of law are nevertheless quite different from one another. Thus as we saw with humanitarian law, the most specific norms enshrined in refugee law are not necessarily the most protective ones when compared to human rights law.

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\textsuperscript{40} date: 06 August 2019
(i) International refugee law in times of armed conflict: between legal mimicry and emancipation from international humanitarian law

International refugee law is as indifferent to armed conflict as international humanitarian law is to refugees. This comes as no surprise as it reflects the segmented approach which prevailed at the end of World War II when the first universal treaties for the protection of individuals were adopted. As a result of such compartmentalization, refugees are approached by humanitarian law within the interstices of its particular norms, whereas refugee law refers to armed conflicts in a transversal and occasional manner.

Nevertheless, the few references to armed conflict in the 1951 Convention relating to the Status of Refugees (Refugee Convention) epitomize the cross linkages and the mutually supportive interactions between refugee law and humanitarian law. The provisions specifically addressing armed conflict in the Refugee Convention are clearly informed by international humanitarian law. The first and most obvious reference appears in the refugee definition. Article 1(F)(a) excludes from the benefit of the Refugee Convention a refugee who ‘has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes’. The grave breaches of GC IV and AP I are instrumental for defining war crimes under the exclusion clause of the refugee definition. Though less ratified than the former international instruments, the Rome Statute of the ICC is also bound to play a substantial role in defining the crimes covered by Article 1(F)(a).

Another implicit reference to international humanitarian law may be found in Article 8 of the Refugee Convention which reproduces in substance Article 44 of GC IV. Their respective scope nevertheless differs slightly. On the one hand, exemption from exceptional measures under international refugee law is broader than its humanitarian law counterpart, since Article 8 applies both in time of armed conflict and peace. On the other hand, as mentioned above, the rationae personae scope of Article 44 is not circumscribed by the refugee definition under the Refugee Convention.

In any event, under both branches of international law, the relevant provisions suffer from the same weakness: exceptional measures may be taken against refugees provided that they are not applied on the sole ground of their nationality. As underlined during the drafting of the Refugee Convention, ‘States would be at liberty to advance a variety of reasons, other than that of nationality, why refugees should be subjected to the measures in question’. According to commentators, this would be notably the case when ‘a refugee, in spite of his genuine fear of persecution by the regime in power in his country of origin, contributes or has contributed to the war effort of that country, or otherwise carries on or has been participating in activities which the measure in question aims at suppressing’. The main concern of the drafters was clearly the fear of fifth columnists, namely ‘enemy aliens professing to be refugees’, carrying out sabotage, espionage and other related activities against the asylum state.

States’ reduced concern towards refugees in times of armed conflict is further displayed by the particularly broad derogation clause contained in Article 9 of the Refugee Convention:

Nothing in this Convention shall prevent a Contracting State, in time of war or other grave and exceptional circumstances, from taking provisionally measures which it considers to be essential to the national security in the case of a particular person, pending a determination by the Contracting State that that person is in fact a refugee and that the continuance of such measures is necessary in his case in the interests of national security.
Article 9 is clearer on what it does not say than on what it does. It does not provide any particular procedure to be followed for invoking such a derogation clause. It does not identify nonderogable rights, nor specify the types and the limits of the measures which can be taken under Article 9. Though virtually applicable to all provisions of the Refugee Convention, this derogation clause has raised considerable debates about its exact scope and content. Authors are divided as to whether it applies in individual cases or in massive influx, and whether it concerns only asylum-seekers during the examination of their request, or all refugees formally recognized as such.\(^{51}\n\nIn any event, the vague and permissive wording of this provision offers a considerable margin of appreciation. Davy even argues that ‘Article 9 provides a carte blanche: contracting States may introduce measures of control as they see fit in order to contain the threat to national security’.\(^{52}\) In practice, however, although several proposals have been made for using the derogation clause in a refugee context,\(^{53}\) Article 9 has hardly ever been invoked by states parties.

If the derogation clause is not applied the whole Refugee Convention remains plainly applicable even in times of armed conflict. This does not mean, however, that national security concerns are totally ignored in such exceptional circumstances. They are in fact incorporated into three major provisions which echo the main concerns of asylum states in times of armed conflict.\(^{54}\) First, under Article 28, states parties are no longer bound to deliver travel documents to refugees wishing to leave their asylum state when ‘compelling reasons of national security or public order otherwise require’. Secondly, Article 32(1) of the Refugee Convention restates that ‘[t]he Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order’. When expulsion is resorted to on these two grounds, the procedural guarantees specified in Article 32(2) can also be suspended for ‘compelling reasons of national security’.\(^{55}\) Thirdly, the cornerstone of international refugee law—the principle of non-refoulement—may be derogated from on the ground of the two exceptions contained in Article 33(2). The first exception specifically refers to ‘a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is’.

However, the tribute paid by the Refugee Convention to national security does not give free rein to asylum states caught in an armed conflict. On the one hand, concerns of national security are incorporated within the Refugee Convention as an exception to the basic guarantees contained therein. As a result, they call for a restrictive interpretation with due regard to the circumstances of each particular case. On the other hand, even when exceptions are clearly justified on the ground of national security, this does not suspend the basic guarantees granted by international humanitarian law and human rights law. Indeed, the three branches of international law must be applied cumulatively so that possible restrictions and exceptions permitted by one of them—can be overridden or conditioned by the rules and guarantees under the other branches.

(ii) **International human rights law as the residual source of refugee protection in armed conflicts**

The continuing applicability of human rights law in times of armed conflict is beyond any doubt. In fact, ‘the question is no longer whether international human rights law applies in armed conflict but how it applies’.\(^{56}\) Similarly to the Refugee Convention, the answer mainly depends on whether the derogation clause applies or not.

Compared to its refugee law counterpart, derogation clauses under human rights law contain five substantive conditions. First, there must be an emergency threatening the life of the nation.\(^{57}\) Secondly, the derogation must be limited to, and go no further than that ‘strictly required by the exigencies of the situation’ in due respect (p. 715) with the principle of proportionality. Third that the derogating measures must not be inconsistent with the state’s other obligations under international law, thus including international
humanitarian law and refugee law. Lastly, derogating measures must not involve discrimination on the ground of race, colour, sex, language, religion, or social origin.  

Further to the substantive conditions, some rights cannot be subject to derogation notwithstanding the existence of a public emergency threatening the life of the nation. While the list of these nonderogable rights varies from one instrument to another, some are common to all, namely: the right to life; the prohibition of torture, inhuman, cruel or degrading treatment; prohibition of slavery and servitude; and the prohibition of criminal conviction or punishment not based on a pre-existing law. As basic as they are, these rights are not mentioned at all in the Refugee Convention. Refugee status is indeed relatively weak with regard to civil and political rights; here human rights law provides a vital source of protection.

Finally, a state seeking to invoke the derogation clause, must fulfil the procedural requirement of immediately informing other states parties and the Secretary General of the relevant organization of the provision from which it wishes to derogate from. Such notice should, at the very least, explain the reasons for the derogation, although General Comment 29 of the Human Rights Committee, and the Siracusa Principles, call for more detailed information to be provided.

Overall, the conditions required by human rights treaties for a derogation to be valid substantially circumscribe the vast margin of appreciation granted by Article 9 of the Refugee Convention, when the relevant exceptional measures interfere with human rights. From this angle, one could even assert with Davy that ‘provisional measures under art. 9 of the 1951 Convention have, over time, become outdated by human rights law’.

The centrality of human rights law in times of armed conflict is even more obvious when the derogation clause under this branch of law does not apply. This may happen for a variety of political and legal reasons, mainly when states abstain from using the derogation clause or when such a possibility is not permitted by the relevant instrument. As far as the first is concerned, states frequently abstain from using the derogation clause in order to avoid any sort of recognition that a rebel group is involved in an internal armed conflict. As notably confirmed by the European Court of Human Rights in the leading case Issayeva v Russia, when ‘no derogation has been made under Article 15 of the Convention […], the operation in question therefore has to be judged against a normal legal background’.

The same conclusion must be drawn for the great majority of treaties which do not contain any derogation clause. Such a clause remains a purely conventional mechanism established for the exclusive purpose of the relevant treaty. In fact, it is enclosed in a very limited number of six instruments, whereas the vast majority of human rights treaties contain no derogation clause. As confirmed by international courts and treaty-bodies, these conventions remain applicable in armed conflicts. This notably concerns the ten core UN instruments (with the only exception of the ICCPR) as well as a substantial number of regional treaties (including for example the ACHPR, or the European Convention on Action against Trafficking in Human Beings).

In short, even if a state uses its right to derogate from the Refugee Convention and/or the relevant human rights treaties, a broad range of human rights obligations still applies concurrently with humanitarian law. Nevertheless, most human rights are not absolute, and can be restricted with due regard to the conditions spelled out in the relevant treaties. Against such a normative framework, a contextualized approach to human rights law is required in order to take into account the particular situation of armed conflict. While a comprehensive comparison of all applicable norms under humanitarian law, refugee law, and human rights law is beyond the scope of this Chapter, a typical example may be found...
in the right to leave which constitutes a common guarantee enshrined in the three branches of international law.

Following our frame of analysis, the legal regime governing the right to leave depends on whether the concerned state derogates from the Refugee Convention and all the relevant human rights treaties. If yes, humanitarian law constitutes an important safeguard. Yet, even in such a case, the parallel obligation under human rights law remains utterly applicable as the right to leave is reinforced in a wide range of universal and regional conventions without any possibility of derogation. The (p. 717) normative prevalence of human rights law is more apparent when the state refrains from using the derogation clause under the few relevant instruments. The personal scope of this basic freedom and the permissible restrictions to it clearly underlie the crucial protection provided by this last branch of international law. Under humanitarian law, freedom to leave is limited to non-nationals in the hands of a party to an international armed conflict, whereas refugee law confines its benefit to ‘refugees lawfully staying in [the] territory’ of asylum states. In stark contrast to humanitarian law, human rights law does apply to everyone including nationals of belligerent states. Furthermore, contrary to refugee law, the human right to leave any country also applies to all non-nationals without regard to their legal status and documentation in the concerned state.

Besides its broad personal scope, human rights law substantially delineates and conditions the permissible restrictions on the right to leave. Both international humanitarian law and refugee law offer a large discretion for prohibiting departure: under the former, leaving the country can be ‘contrary to the national interests of the State’, whereas, under the latter, ‘compelling reasons of national security or public order [may] otherwise require’. By contrast, under human rights law, restrictions are only permissible when the three following conditions are duly fulfilled: (1) permissible restrictions must have a legal basis; (2) they must be necessary to protect national security, public order, public health, morals, or the rights and freedoms of others; and (3) such restrictions must be consistent with the other rights recognized in the relevant instruments. One should further add that, contrary to refugee law, both humanitarian law and human rights law provide procedural guarantees governing restrictions to the right to leave. According to Article 35(1) of GC IV, any refusal to leave the country must be reviewed by ‘an appropriate court or administrative board designated by the Detaining Power for that purpose’. Human rights law achieves the same result through the right to an effective remedy as applied in connection with the right to leave.

3 Refugees from War

When refugees and other victims of armed conflicts have left the belligerent state, the crucial issue is then to find protection in another state. This is primarily governed by the principle of non-refoulement which is a common feature of international humanitarian law, refugee law, and human rights law. Its application to refugees from war nonetheless raises two major questions: first, the access to protection and more specifically entry to the territory of an asylum state in a situation of massive influx (Section A); and secondly, the type of protection granted to these persons (Section B).

A. Access to protection: the principle of non-refoulement and the spectre of massive influx

Although the principle of non-refoulement clearly encompasses rejection at the frontier, its applicability in case of massive influx represents the most vexed controversy of international refugee law. While states’ anxiety towards mass influx is (p. 719) palpable, international refugee law does not provide a clear-cut answer in favour of one or another
interpretation. In fact, the two opposite views can be equally justified by sensible arguments.

On the one hand, state delegates made clear during the drafting of the Refugee Convention that ‘the possibility of mass migrations across frontiers or of attempted mass migrations was not covered by article 33’. This interpretation has then been endorsed as an exception to the principle of non-refoulement in the Declaration on Territorial Asylum adopted by the General Assembly in 1967. According to its Article 3(2), ‘exception may be made to the foregoing principle only for overriding reasons of national security or in order to safeguard the population, as in the case of a mass influx of persons’. This resurfaced ten years later, in 1977, at the abortive Conference on Territorial Asylum. Turkey proposed an amendment whereby non-refoulement could not be claimed ‘in exceptional cases, by a great number of persons whose massive influx may constitute a serious problem to the security of a Contracting State’.

On the other hand, nothing in the text of Article 33 arguably precludes its application to mass influx. Its wording is particularly inclusive as it prohibits ‘in any manner whatsoever’ any act of forcible removal or rejection towards a country of persecution. The plain applicability of the principle in situations of mass influx has been further acknowledged by the Executive Committee of the United Nations High Commissioner for Refugees (UNHCR). By contrast, the two exceptions endorsed in Article 33(2) do not envisage massive influx: they are instead limited to an individual refugee who is a danger to the security or to the community of the state. Even assuming that the notion of national security has in fact been enlarged to cover similarly exceptional threats arising from massive influxes, effective refusals of entry based on such a ground are relatively rare, when compared (p. 720) to the longstanding state practice of granting temporary protection in a situation of massive influx.

Whatever the respective merits of the two possible interpretations, human rights law compensates for the uncertainty surrounding Article 33 of the Refugee Convention. Two main arguments may be invoked to justify such a stance. First, the principle of non-refoulement under human rights law is absolute; it does not permit any exceptions or derogations when there is a real risk of torture, inhuman, or degrading treatment. As a result, a danger to national security arising from a massive influx does not exempt states from their human rights duty of non-refoulement. Secondly, the prevalence of human rights law in situations of mass influx finds additional support in its prohibition of collective expulsion. This absolute prohibition is endorsed in all regional human rights treaties. Though not explicitly mentioned in the ICCPR, the Human Rights Committee has also construed Article 13 as implicitly prohibiting collective expulsion. Likewise, the Committee on the Elimination of Racial Discrimination comes to the conclusion that collective expulsions violate the prohibition of racial discrimination.

A parallel prohibition of mass transfers and deportations can be found in international humanitarian law within Article 49(1) of GC IV. Its applicability is nevertheless confined to protected persons in the hands of an Occupying Power. Its content is further qualified by the possibility of undertaking evacuation of a given area ‘if the security of the population or imperative military reasons so demand’. (p. 721) Besides such a margin of appreciation, the exact scope and content of Article 49(1) has also raised some longstanding controversies.

In any event, the continuing applicability of human rights law in times of armed conflict obviates the limits and ambiguities of both refugee law and humanitarian law. The human rights prohibition of collective expulsion suffers from no exception or derogation. It further applies to any non-citizens—whether documented or not—who are within the jurisdiction of the state and without regard to the risk of ill-treatment in the country of destination. One could still contend that the prohibition of collective expulsion does not apply to massive
influx, because the term ‘expulsion’ does not cover ‘refusal of entry’ or ‘rejection at the border’. Such a line of reasoning is, however, not convincing. Although expulsion may have a particular understanding in domestic law, under international law this notion has an autonomous meaning determined by the object and purpose of the relevant treaty and in due accordance with the principle of effectiveness. This has been restated by the European Court of Human Rights in the leading case Hirsi v Italy. The Court dismissed the argument of the Italian Government according to which the contested measure (maritime interception) was a ‘refusal to authorize entry into national territory rather than “expulsion”’. By doing so, the Grand Chamber unambiguously confirmed that the prohibition of collective expulsion generally applies to any measure ‘the effect of which is to prevent migrants from reaching the borders of the State or even to push them back to another State’. 

As a result of this general prohibition, expulsion and other related measures of refoulement can only take place after an individual examination of each particular case. In sum, under international human rights law, the general prohibition of collective expulsion combined with the principle of non-refoulement converges in ensuring that, even in situations of mass influx, asylum-seekers shall have temporary asylum during the examination of their request. The next issue is then to identify on which grounds victims of armed conflict may be protected in asylum states.

B. The grounds of protection: between a rock and a hard place?

The grounds of protection for victims of armed conflicts provide for another paradigmatic illustration of the complementarity approach. Indeed, each of the three branches of international law virtually covers war refugees, though their respective scope significantly varies from one to another.

Under international refugee law, the definition spelled out in Article 1A(2) of the Refugee Convention (as amended by its 1967 Protocol) is normally apt to cover most victims of armed conflicts. Eligibility for refugee status depends on three cumulative conditions: (1) a well-founded fear of (2) being persecuted (3) for reasons of race, religion, nationality, membership to particular social group and political opinion. In fact, each of these requirements is plainly relevant when applied to the particular context of armed conflicts. With regard to the first condition, the very notion of ‘well-founded fear’ requires a prospective assessment grounded on two prognostic factors: the personal circumstances of the applicant as well as the general situation prevailing in the destination country. Clearly, the existence of an armed conflict is a key consideration for assessing the general situation in the state of origin and thus the risk of ill-treatment in case of return.

Furthermore, even if the fear is individual by nature, such a fear might find its origin in a collective phenomenon affecting a whole group of persons indistinctively. Indeed a distinction must be drawn between the individual nature of the fear and the collective character of the persecution: the former does not exclude the latter. On the contrary, in some circumstances, the collective character of the persecution may even presume the individual nature of the fear. The very notion of collective persecution is further confirmed by the wording of the Refugee Convention. The five grounds of persecution are primarily identified by reference to membership to a group of persons (whether racial, religious, national, social, or political). They further coincide with the typical causes of most contemporary armed conflicts.

Against such a framework, acts of war perpetrated against civilians on account of their race, religion, nationality, political opinion, or membership to a particular social group arguably constitute the archetype of persecution. In this regard, several commentators have further suggested that international humanitarian law should provide guidance for construing the refugee definition under Article 1A(2) of the Geneva Convention. Such a possibility may nevertheless be counterproductive. On the one hand, defining persecution...
as a violation of humanitarian law may distract the attention of decision-makers in placing too much emphasis on peripheral issues which are not crucial for assessing an asylum request (eg whether the situation in the state of origin corresponds to the legal definition of an armed conflict, whether the applicant is a protected person, or whether the balance between humanitarian considerations and military necessity has been adequately applied by the belligerents …). On the other hand, the notion of persecution under the Refugee Convention already benefits from a well-established definition as a serious violation of human rights.92 With the continuing applicability of human rights law in armed conflicts, there is no need to further complicate the assessment of asylum requests by resorting to another branch of law. In any event, any grave violation of humanitarian law already corresponds in substance to a serious violation of human rights for the purpose of the refugee definition.93

In practice, however, the potential of the refugee definition for victims of armed conflicts starkly contrasts with the reticence of states parties to the Geneva Convention. Though nothing precludes the application of the refugee definition to persons fleeing armed conflicts, states’ interpretations remain highly divergent and frequently restrictive.94 This is exemplified by the wide disparity in refugee (p. 724) recognition rates concerning persons coming from the same countries plagued by conflicts.95 The most common ground for refusing protection is to require a so-called ‘differentiated risk’ over and above that of other civilians caught up in the armed conflict.96

The uncertainty surrounding the applicability of the refugee definition and the correlative gap of protection have been partially mitigated by some regional instruments following two different approaches. In the Global North, the European Union has consecrated a specific regime of subsidiary protection based, inter alia, on ‘indiscriminate violence in situations of international or internal armed conflict’.97 Subsidiary protection appears as an additional—and arguably concurrent—device to the Refugee Convention. It indirectly gives a pretext for justifying the restrictive interpretation of the refugee definition in the context of armed conflicts. Resort to subsidiary protection for victims of armed conflict has proved to be disappointing and its application has raised many controversies regarding its exact scope and content.98(p. 725)

Regional endeavours carried out in the Global South have followed a different approach, ultimately less convoluted and more protective: the refugee definition under the Geneva Convention has been explicitly extended to any person fleeing armed conflicts. The pioneer regional instrument in this area was adopted in 1969 by the Organization of African Unity. Article 1(2) of the Convention Governing the Specific Aspects of Refugee Problems in Africa states:

The term refugee shall also apply to every person who, owing to external aggression, occupation, foreign domination, or events seriously disturbing public order in either part or the whole of his country of nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside of his country of origin or nationality.

The African model of refugee protection has been further endorsed in Latin America with the 1984 Declaration of Cartagena.99

At the universal level, however, human rights law still remains the most clear-cut avenue for compensating the restrictive interpretation of the refugee definition. Under this branch of law, the principle of non-refoulement unequivocally prohibits states from sending back persons who are exposed to a real risk of torture or inhuman and degrading treatment in the midst of an armed conflict.100 Compared to the Refugee Convention, its large and objective scope highlights two main characteristics: its absolute character impedes any
possible derogation and the notion of inhuman or degrading treatment is not qualified by one of the five limitative grounds of persecution.

Furthermore, the human rights principle of non-refoulement has been construed as establishing a presumption of inhuman or degrading treatment in some cases of generalized violence. As underlined by the European Court of Human Rights, (p. 726) ‘a general situation of violence in a country of destination [can] be of a sufficient level of intensity as to entail that any removal to it would necessarily breach Article 3 of the Convention’. Though such a level of intensity remains exceptional by nature, the Court has also made clear that membership of a group systematically exposed to ill-treatment is sufficient on its own to trigger the duty of non-refoulement without any further distinguishing features.

Protection against forced return in times of armed conflict finds an additional support in international humanitarian law. According to Article 45(4) of GC IV, ‘[i]n no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs’. Although this provision has been partially reproduced in the refugee definition endorsed two years later in the 1951 Convention, it has subsequently been overtaken by human rights law for three main reasons.

First, the notion of torture, degrading and inhuman treatment is broader than the one of persecution on account of political opinions or religious beliefs, even if they may overlap in practice. Secondly, though worded in categorical terms, the prohibition of transfer does not prejudice extradition provided that this is done ‘in pursuance of extradition treaties concluded before the outbreak of hostilities’ and for ‘offences against ordinary criminal law’. By contrast, the human rights principle of non-refoulement applies to all measures of removal (including extradition) and without regard to the criminal record of the person at risk of torture, degrading, or inhuman treatment. Thirdly, the scope of the prohibition contained in international humanitarian law is confined to protected persons on the territory of a state party to an international armed conflict.

4 Refugees in Post-War Contexts

Refugees in post-war contexts constitute another case for highlighting the centrality of human rights law. The termination of hostilities inevitably begs the question of the end of refugee protection and the correlative return to the state of origin. This highlights in turn a dilemma inherent to any process of post-conflict peacebuilding: can one consider that the end of a conflict constitutes, in and of itself, a fundamental change of circumstances justifying the withdrawal of refugee protection, when a sustained peace has not yet been established, and the massive return of refugees may serve as an additional source of destabilization? On the other hand, return and reintegration of refugees can be a decisive factor in the reconstruction of a country.

An empirical solution to this normative and political dilemma has been found through the notion of voluntary repatriation. While voluntary repatriation is commonly referred to as ‘the ideal solution to refugee problems’, international refugee law is rather silent on this (Section A). Instead, it is human rights law which gives voluntary repatriation its full normative scope and content, even when international humanitarian law provides for more specific norms in relation to prisoners of war and civilian internees (Section B).

A. Voluntary repatriation: the human right to return filling the silence of international refugee law

With the promotion of voluntary repatriation entrusted to UNHCR, one could legitimately expect its normative framework to be settled by international refugee law. Voluntary
repatriation has, however, evolved quite outside the refugee law framework to become both a practice of states and an institutional policy of UNHCR.\(^{110}\) (p. 728)

The Refugee Convention is indeed silent on voluntary repatriation. The reason for this can be found in its primary rationale: it exclusively focuses on the obligations of asylum states without envisaging refugee protection from a more holistic perspective encapsulating both states of origin and asylum. Following its specific stance, the Refugee Convention implicitly favours integration in the country of asylum. It associates refugee status with a substantial range of basic guarantees and social benefits,\(^{111}\) and calls for facilitating naturalization of refugees in asylum countries.\(^{112}\) The only references to return to country of origin are made in prohibitive terms: Article 32 bars expulsion of refugees, except for exceptional circumstances, and Article 33 lays down the fundamental principle of *non-refoulement*. This focus on prohibiting return comes as no surprise for ‘refugees are by definition “unrepatriable”’\(^{113}\) because of their well-founded fear of being persecuted in their country of origin.

Voluntary repatriation is understood in a similarly oblique way through the cessation clause of Article 1.C(4). According to this provision, the Refugee Convention is no longer applicable when the refugee ‘has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution’. But even in such an instance, voluntary repatriation does not justify, on its own, withdrawal of refugee status.\(^{114}\) This is possible only when the refugee is re-established in his/her country of origin.

While voluntary repatriation is not addressed as such by the Refugee Convention, some regional instruments (including most notably the OAU Convention)\(^{115}\) have endorsed it as a key principle of refugee protection. By contrast, human rights law provides a solid and universal legal basis with the right to enter one’s own country.\(^{116}\) In this regard, the Human Rights Committee underlines that ‘the right of a person to enter his or her own country […] includes […] the right to return after having left one’s own country’ which ‘is of the utmost importance for refugees seeking voluntary repatriation’.\(^{117}\) The human right to return is thus crucial for ensuring both (p. 729) the voluntary nature of repatriation and the correlative obligation of states of origin to admit their nationals.\(^{118}\)

This contextual understanding of the human right to return has been further developed by the Committee on the Elimination of Racial Discrimination in its *General Recommendation No 22: Article 5 and Refugees and Displaced Persons*:

(a) All such refugees and displaced persons have the right freely to return to their homes of origin under conditions of safety;

(b) States parties are obliged to ensure that the return of such refugees and displaced persons is voluntary and to observe the principle of non-refoulement and non-expulsion of refugees;

(c) All such refugees and displaced persons have, after their return to their homes of origin, the right to have restored to them property of which they were deprived in the course of the conflict and to be compensated appropriately for any such property that cannot be restored to them. Any commitments or statements relating to such property made under duress are null and void;

(d) All such refugees and displaced persons have, after their return to their homes of origin, the right to participate fully and equally in public affairs at all levels and to have equal access to public services and to receive rehabilitation assistance.\(^{119}\)
This human rights-based approach has also been refined through *The Principles on Housing and Property Restitution for Refugees and Displaced Persons*, endorsed by the UN Sub-Commission on the Promotion and Protection of Human Rights in 2005.\(^{120}\) Known as the Pinheiro Principles, they elaborate key human rights relating to the equitable restitution of housing and property and provide guidelines to states and international actors for ensuring access to these rights.

In short, human rights law provides an indispensable yardstick for framing the legal content of both return and reintegration of displaced persons in their own countries. Although much remains to be done for ensuring their basic rights in peacebuilding processes,\(^{121}\) it contributes to fill the silence in the Refugee Convention, highlighting the vital interplay between these two branches of international law for the purpose of promoting a holistic approach to refugee protection.\(^{p. 730}\)

**B. How voluntary is repatriation? International humanitarian law versus international human rights law**

In post-conflict situations, repatriation is nonetheless not solely governed by human rights law but also by international humanitarian law. This last branch provides states with the obligation to repatriate prisoners of war and civilian internees at the end of hostilities. Such a reliance on humanitarian law understanding of repatriation is, however, unable to promote the voluntary nature of reparation, thereby demanding recourse to human rights law.

Under humanitarian law, the obligation to repatriate is framed in categorical terms without reference to the willingness of the concerned person to be so returned. Article 118 of GC III requires that ‘[p]risoners of war shall be released and repatriated without delay after the cessation of active hostilities’.\(^{122}\) In fact, during the 1949 Diplomatic Conference, an Austrian amendment was introduced to grant prisoners of war a right ‘to apply for their transfer to any other country [than their country of origin] which is ready to accept them’.\(^{123}\) The proposal was, however, rejected by a large majority of delegations for fear that prisoners might not have the free will to so decide.\(^{124}\) Moreover, the absolute obligation of repatriation is further reinforced by the inalienability of a prisoner of war’s rights, which cannot be renounced under any circumstances.\(^{125}\)

While the obligation to repatriate civilian internees under Article 134 of GC IV may sound less categorical,\(^{126}\) the ICRC study reaffirms its unconditional nature under customary international law for both types of protected persons.\(^{127}\) It even reminds that ‘[a]n “unjustifiable delay in the repatriation of prisoners of war or civilians” constitutes a grave breach of Additional Protocol I’.\(^{128}\) Ultimately, such categorical obligations not only require states to enforce repatriation at any price—even on an involuntary basis—but may also conflict in practice with the principle of *non-refoulement*.

This is probably the only case of a true conflict of norms between international humanitarian law, refugee law, and human rights law. The absolute duty to repatriate prisoners of war without delay is in contradiction with, and superseded by, (p. 731) international refugee law when these prisoners have a well-founded fear of being persecuted in the destination state. This refugee law prohibition of forcible repatriation does not apply when prisoners of war have committed war crimes or any other acts falling under the exclusion clause of Article 1F or under the exceptions of the *non-refoulement* duty of Article 33(2). Yet, even in such a case, human rights law still prevails over the humanitarian law obligation of repatriation as it bans any forcible return where there is a real risk of torture, degrading or inhumane treatment.
Instead of a conflict of norms, such a divergence could be simply understood as the successive application of humanitarian law, refugee law, and human rights law. In any event, the result is the same: contrary to Article 118 of GC III, prisoners of war shall not be repatriated without delay after the cessation of active hostilities, when they fall under the refugee definition, or are otherwise exposed to a real risk of degrading treatment.

It is true that, in subsequent practice, Article 118 of GC III has rarely been applied in the automatic way suggested by its categorical wording. Since the Korean War, and especially since the two Gulf wars, the common stand is that of not repatriating prisoners unwilling to return home for fear of mistreatments therein. Such practice has been endorsed by the ICRC and it is even advanced as a norm of customary international law for both prisoners of war and civilian internees.

For the ICRC, the customary law obligation of repatriation should thus be interpreted as including an additional duty of taking into account the wish of the concerned person. While this unapparent conclusion could be grounded on Article 45 of GC IV with regard to civilian detainees, the argument advocated in favour of a similar guarantee for prisoners of war is particularly weak. Though the ICRC recognizes that such provision is absent from GC III, it underlines that every repatriation in which it has been involved as a neutral intermediary has been conducted after a prior interview ascertaining the person’s wish to be so repatriated. One would expect more than ICRC practice for grounding such a customary law interpretation clearly contradicting the unconditional wording of Article 118 of GC III. By contrast, the lack of any reference to the human rights principle of non-refoulement is odd to say the least.

State practice may indeed have evolved into a customary norm but, if so, this development has itself been framed by, and grounded in human rights law, rather than humanitarian law. First, international humanitarian law was originally conceived as a set of inter-state obligations (eg the obligation of repatriation); it is thanks to human rights law that the focus has been further placed on individuals as bearers of rights and obligations under international law (eg the right to repatriation). Secondly, this customary norm of international law is nothing else but the acknowledgment of the human rights principle of non-refoulement. Prisoners of war and civilian internees cannot be repatriated where they would be at risk of torture or inhumane or degrading treatment upon return.

5 Conclusion

Though this has not always been the case, the simultaneous application of international humanitarian law, human rights law, and refugee law is no longer contested. This common assumption nevertheless belies the complexity of the relationship between the three legal regimes and the difficulties arising from the identification, interpretation, and application of the relevant norms. Undoubtedly, no single branch offers a definitive answer to the contemporary challenges of armed conflicts: the reach of international protection can only be apprehended through a complementary, and thereby cumulative, approach of the branches of international law applicable in times of armed conflicts.

Furthermore, while international humanitarian law, refugee law, and human rights law are clearly the three pillars of the refugee protection regime, their multifaceted interactions constitute a fertile ground for apprehending forced migration through a holistic and systemic approach. From a comparative perspective, international refugee law has more in common with international humanitarian law than it has with international human rights law. The reasons for this are both historical and structural.
The four Geneva Conventions of 1949 and their refugee sister adopted two years later are children of their times. Though both refugee law and humanitarian law have been amended (and partially updated) in the 1960s and 1970s, they have still retained some common distinctive features which arguably reflect their stage of development. The normative structure of international humanitarian law and refugee law converges on three major components. First, the two legal regimes are primarily framed as obligations of states, instead of individual rights. Secondly, under each branch of international law, the traditional distinction between nationals and non-nationals remains a foundation stone for identifying and framing the applicable norms. Thirdly, both international humanitarian law and refugee law rely on a decentralized scheme of implementation without a proper supervisory mechanism. Though the ICRC and the UNCHR are the key humanitarian actors in their respective field, they are not monitoring bodies in charge of supervising states’ conduct. Overall, the basic principle underlying the three common attributes of international humanitarian law and refugee law is the tribute paid to the sacrosanct sovereignty of states.

While international human rights law does not fundamentally depart from the state-centric approach to international law, it diverges on each of the three above characteristics of international humanitarian law and refugee law. The human rights-based approach to the law of armed conflict proves to be essential in compensating for the limits inherent to the other applicable legal regimes.

Though international humanitarian law is supposed to be the tailor-made regime applicable in times of armed conflict, it does not endorse the most protective norms. It provides instead a minimum standard within the strict limits of its particular scope (namely the treatment of non-nationals in the hands of a party to the conflict). The minimum, if not minimalist, protection granted by international humanitarian law is upgraded by the cumulative application of the other applicable branches of international law. Nevertheless, even through this approach, international refugee law does not provide the most specific frame of protection for those fleeing armed conflicts.

Even worse, both international humanitarian law and refugee law appear to be relatively indifferent to the specific needs of refugees in war, from war and in post-war contexts. As observed by Kälin,

> [A] traditional understanding of the relationship between international humanitarian law and refugee law maintains that refugee law was not really made to address the plight of those who had to flee the dangers of war and seek refuge abroad. At the same time, international (p. 734) humanitarian law does not provide any protection for this large category of persons in need of international protection.136

Against such a background, international human rights law is bound to play a vital role for compensating and arguably updating international humanitarian law and refugee law. Human rights law must thus be taken seriously by humanitarian and refugee lawyers. Though every specialist is naturally inclined to comprehend the world through the myopic lens of his/her own discipline, some substantial progress has been made during the last decade for facilitating cross-disciplinary dialogue. It is true that the professional culture and the particular ethos of each discipline are still very present in governmental, non-governmental, and academic circles. However, there is, after all, nothing insurmountable in ensuring that international humanitarian law, refugee law, and human rights law are no longer competitors but brothers in arms.
Besides all their differences, the three branches of international law share the same fundamental objective, notably restated by the International Tribunal for the former Yugoslavia:

The general principle of respect for human dignity is the basic underpinning and indeed the very raison d’être of international humanitarian law and human rights law; indeed in modern times it has become of such paramount importance as to permeate the whole body of international law.¹³⁷

Similarly, the very function of international refugee law is to ensure the effective respect for human dignity when victims of abuses have no other option than to leave their own country. From this stance, international refugee law cogently constitutes ‘a right to have rights’ following Arendt’s terminology:

The new refugees were persecuted not because of what they had done or thought, but because of what they unchangeably were—born into the wrong kind of race or the wrong kind of class or drafted by the wrong kind of government […] but […] they were and appeared to be nothing but human beings whose very innocence—from every point of view, and especially that of the persecuting government—was their greatest misfortune.¹³⁹

Footnotes:


10 See notably UN Doc A/RES/64/77 (2010), § 2; UN Doc A/RES/57/230 (2002), § 3(b).

11 See eg HRC Res S-8/1 (2008), § 1.


13 See for instance Art 5 of the Geneva Convention relating to the Status of Refugees and Art 5(2) of the ICCPR.

14 See most notably Art 75(8) of AP I (‘No provision of this Article may be construed as limiting or infringing any other more favourable provision granting greater protection, under any applicable rules of international law, to persons covered by paragraph 1’). See also Art 72 of AP I (‘The provisions of this Section are additional to […] other applicable
rules of international law relating to the protection of fundamental human rights during international armed conflict’).

15 See Art 49 of GC IV and Art 17 of AP II.

16 Article 44 of GC IV deals with the relations between the state of asylum and refugees who are nationals of a belligerent state; Art 70 of the same Convention addresses the relations with their state of origin when the latter is occupying the asylum state; and, finally, Art 73 of AP I concerns refugees who have been recognized as such before the armed conflict. See also implicitly at least, Art 45(4) of GC IV.


18 ICJ, Legality of the Threat or Use of Nuclear Weapons (n 6), § 79.


21 Part II of the Fourth Convention already applies to refugees as member of the civilian population.

22 Articles 35–37 and 48 of GC IV.

23 Articles 41–43 and 78–133 of GC IV.

24 Articles 45 and 49 of GC IV.

25 Commentary AP I and II, § 2951.

26 Whether binding or not, all these international instruments must have been ‘accepted by the Parties concerned’ in order to make sure that states would not be indirectly bound by instruments they are not parties to by virtue of AP I (see Commentary AP I and II, § 2952). Despite its broad understanding of the term ‘international instruments’, the ICRC commentary construes this last requirement as referring to ‘States which are Parties to them if they are treaties, or States which have given them binding force, or which recognize their binding force, if they are resolutions’ (Commentary AP I and II, § 2952). In any event, however, the decision taken by the asylum state to grant the refugee status or any other forms of complementary protection is binding upon all parties to the conflict whether such decision has been taken under its own domestic law and/or under international instruments it has accepted (Commentary AP I and II, § 2952).

28 Obradovic (n 27), 147.

29 ‘In applying the measures of control mentioned in the present Convention, the Power shall not treat as enemy aliens exclusively on the basis of their nationality de jure of an enemy State, refugees who do not, in fact, enjoy the protection of any government.’

30 With such a factual focus on the absence of protection, Art 44 might also well cover the significant number of persons in need of protection who fall under the protection mandate of the UNHCR regardless of their official recognition as refugees by the asylum state.


32 Commentary GC IV, 264–5.

33 See among others: Jacques (n 2), 168–9; Obradovic (n 27); and Dinstein (n 1), 96–7.

34 The same applies to refugees who are nationals of a state which has not ratified GC IV but such a case is particularly rare given its almost universal ratification.

35 Commentary GC IV, 351.

36 Dinstein (n 1), 104.

37 One should add that, though circumscribed to nationals of the Occupying Power, the personal scope of Art 70 is slightly broader than Art 73, since it does not require that refugees have been recognized as such by the state of asylum. Although this specificity is rarely underlined, Art 70 refers instead to persons who ‘have sought refuge in the territory of the occupied State’, including thus not only refugees but also asylum-seekers (who asked for protection but have not been formally recognized as refugees).

38 For a similar account, see notably: Jacques (n 2), 176.

39 For further discussions about the origins and rationale of this well-known distinction of international refugee law, see V. Chetail, ‘Théorie et pratique de l’asile en droit international classique: étude sur les origines conceptuelles et normatives du droit international des réfugiés’, 115 Revue générale de droit international public (2011) 625–52.

40 Commentary GC IV, 351; Dinstein (n 1), 104.

41 Commentary GC IV, 351.

42 For further discussion on the inclusion clauses of the refugee definition with regards to victims of armed conflict see Section 2.B.

43 For an overview, see C. Bauloz, ‘L’apport du droit international pénal au droit international des réfugiés: l’article 1F(a) de la Convention de 1951’, in V. Chetail and C. Laly-Chevalier (eds), Asile et extradition: théorie et pratique des clauses d’exclusion au statut de réfugié (Brussels: Bruylant, 2014) and the bibliographical references contained therein.

44 ‘With regard to exceptional measures which may be taken against the person, property or interests of nationals of a foreign State, the Contracting States shall not apply such measures to a refugee who is formally a national of the said State solely on account of such nationality. Contracting States which, under their legislation, are prevented from applying

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the general principle expressed in this article, shall, in appropriate cases, grant exemptions in favour of such refugees.’

45 The influence of international humanitarian law is further confirmed by the fact that no similar provision was contained in the previous arrangements and conventions relating to the status of refugees adopted during the inter-war period. Article 44 of GC IV was adopted as a result of the experiences of World War II in order to take into account the observations made by the International Refugee Organization and the Israel Delegation during the 1949 Diplomatic Conference: Commentary GC IV, 263.

46 Ad Hoc Committee on Statelessness and Related Problems, Status of Refugees and Stateless Persons—Memorandum by the Secretary-General, 1950, 48 (‘if this rule is to be applied in time of war, a similar rule must a fortiori be applied in time of peace’).

47 The added value of Art 8 is further mitigated by its second sentence which enlarges the —already substantial—margin of discretion in implementing this provision.


50 UN Doc E/AC.32/SR.34 (1950). See also UN Doc E/AC.31/SR.21 (1950), § 33.


52 Davy (n 51), 784.

53 It is noteworthy that such proposals have been made by refugee lawyers for reasserting the centrality of the Refugee Convention through the use of derogation clause in case of mass influx. J.-F. Durieux and J. McAdam, ‘Non-Refoulement Through Time: The Case for a Derogation Clause to the Refugee Convention in Mass Influx Emergencies’, 16(4) International Journal of Refugee Law (2004) 5–24; Edwards (n 51), 595–635.

54 This probably explains why Art 9 has been so rarely invoked by states parties as their concerns are already taken into account in the key provisions of the Refugee Convention.

55 This does not concern, however, the additional guarantees granted by Art 32(3). Thus, even in times of armed conflicts and provided that Art 9 is not invoked by the states parties, they ‘shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary’.

Article 4(1) of ICCPR; Art 15(1) of ECHR; Art 27(1) of ACHR; Art 4(1) of the Arab Charter on Human Rights; Art 35(1) of the Commonwealth of Independent States Convention on Human Rights and Fundamental Freedoms (CIS Convention); Art 30(1) of the European Social Charter. Note that the American Convention uses slightly different terminology: ‘in a time of war, public danger or other emergency that threatens the independence or security of a State Party’.

Article 15(1) of ECHR; Art 4(1) of ICCPR; Art 27(1) of ACHR; Art 35(1) of the CIS Convention; Art 4(1) of the Arab Charter on Human Rights; Art 30(1) of the European Social Charter.

The European Convention and the CIS Convention contain the most restrictive list of underogeble rights, while the Arab Charter enumerates the most extensive one. It is noteworthy that the Arab Charter consecrates as underogable rights the following key guarantees: freedom to leave any country, prohibition to be compelled to reside in any part of the country, and prohibition of exile and return in his own country (Art 27); the right to seek asylum (Art 28); and the right to nationality (Art 29).

Article 15(2) of ECHR; Art 4(2) of ICCPR; Art 27(2) of ACHR; Art 35(2) of the CIS Convention; Art 4(2) of the Arab Charter.

Lawless v Ireland (No 3) [1961] ECHR 2 (ECtHR), § 47.


Davy (n 51), 803.

ECtHR, Issayeva v Russia, Judgment of 24 February 2005, App No 57950/00, § 191.


Article 35 and 48 of GC IV.

Article 28 of the Refugee Convention.

General Comment No 27: Freedom of movement (Art 12), UN Doc CCPR/C/21/Rev.1/Add.9 (1999), § 8.

Article 35(1) of GC IV. According to the ICRC Commentary, “national interests” is broader than “security considerations.” [...] With this wording the belligerents may object to someone’s departure not only when it would endanger their security but also when the national economy would suffer as a result. [...] A great deal is thus left to the discretion of the belligerents, who may be inclined to interpret “national interests” as applying to many different spheres’; Commentary GC IV, 236.

The Human Rights Committee has recalled that 'Article 12, paragraph 3, clearly indicates that it is not sufficient that the restrictions serve the permissible purposes; they must also be necessary to protect them. Restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected. [Moreover] the application of the restrictions permissible under article 12, paragraph 3, needs to be consistent with the other rights guaranteed in the Covenant and with the fundamental principles of equality and non-discrimination': General Comment No 27 (n 69), §§ 14 and 18.


UN Doc A/Conf.78/C.1/L.28/Rev.1, adopted in the Committee of the Whole by 24 votes to 20 with 40 abstentions.

One should further add that Art 33 applies whether asylum-seekers enter the territory legally or illegally. This basic protection is further reinforced by Art 31(1) of the Geneva Convention. This provision prohibits the imposition of penalties on account of their illegal entry provided that: they come directly from a country of persecution; they present themselves without delay to the national authorities; and they show good cause for their illegal entry.

Among a plethoric number of similar conclusions, see Executive Committee (ExCom) Conclusions Nos 15 XXX (1979), [f]; 22 XXXII (1981), [A.1, 2]; 79 (XLVII) (1996), (i); 100 LV (2004), [i]; 103 LVI (2005), [l].


Article 22(9) of ACHR; Art 12(5) of ACHPR; Art 4 of Protocol No 4 of ECHR; Art 26(b) of the Arab Charter; Art 25(4) of the CIS Convention; and Art 19(1) of the Charter of Fundamental Rights of the European Union.

*General Comment No 15: The Position of Aliens under the Covenant*, UN Doc HRI/GEN/1/Rev.1 at 18 (1986), § 10. Though much less ratified, see also for an explicit restatement of this well-established prohibition, Art 22(1) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.


‘Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.’

Article 49(2).


*Hirsi Jamaa and Others v Italy* (n 87), § 180.


91 See notably Holzer (n 90), 19-22; Storey (n 4), 19-21; Edwards (n 2), 433-4; Von Sternberg (n 2), 320; Jaquemet (n 2), 665-9; Storey and Wallace (n 90), 359; B. Rutinwa, ‘Refugee Claims Based on Violation of International Humanitarian Law: The “Victims” Perspective’, 15 Georgetown Immigration Law Journal (2000) 497-517.


93 One should further add that the definition of persecution under international criminal law also converges with its refugee law counterpart as referring to a serious violation of human rights. According to Art 7(2)(g) of the Rome Statute, “Persecution” means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity’. This definition nevertheless contrasts with the one under refugee law with regard to its collective nature. This last characteristic is required by international criminal law simply because, according to the definition of the crime against humanity, persecution is ‘part of a widespread or systematic attack directed against any civilian population’. By contrast, in international refugee law, persecution may be either collective or individual depending on the specific context of the case.

94 The position of UNHCR has also not always been clear. In its Handbook first published in 1979, it considered: ‘Persons compelled to leave their country of origin as a result of international or national armed conflicts are not normally considered refugees under the 1951 Convention or Protocol. However, foreign invasion or occupation of all or part of a country can result—and occasionally has resulted—in persecution for one or more of the reasons enumerated in the 1951 Convention’: UNHCR, Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (Geneva: UNHCR, 1979), §§ 164-5. UNHCR has since clarified that, in many situations, persons fleeing conflicts may have a well-founded fear of persecution for a 1951 Convention ground: UNHCR, Note on International Protection, UN Doc A/AC.96/850 (1995), § 11.

95 Such a disparity has been highlighted by the UNHCR in the case of asylum-seekers from Afghanistan, Iraq, and Somalia in EU host countries. According to the Refugee Agency, ‘The variation extends to as much as 33 percent with regard to first instance decisions relating to Afghanistan in 2010, 50 percent with regard to Iraq and 72 percent with regard to Somalia’. UNHCR, Safe at Last? Law and Practice in Selected EU Member States with Respect to Asylum-Seekers Fleeing Indiscriminate Violence (Geneva: UNHCR, 2011), 17, see also tables at 17-18.
96 See eg Mohamed v Ashcroft (2005) 396 F.3d 999, 1006 (8th Cir); Adan v Secretary of State for the Home Department (1998) 2 WLR 702, per Lord Slynn of Hadley; Isa v Canada (Secretary of State) (1995) FCJ No 354, 72. For further discussions about the state practice, see the doctrinal references mentioned above.

97 Article 15(c) of the Qualification Directive 2004/83/EC.


N.A. v United Kingdom (n 101), § 115. Such a situation has been nevertheless acknowledged by the Court as regards Mogadishu, Somalia: Sufi and Elmi v United Kingdom, 28 June 2011, App Nos 8319/07 and 11449/07, § 248.


As mentioned before, besides religion and political opinion, three other grounds of persecution have been added in the Refugee Convention (race, nationality, and membership of a particular social group).

One could argue, however, that Art 45(3) further prohibits any transfer when the destination state is unable or unwilling to apply the Fourth Geneva Convention, thereby triggering the risk of violation of any rights and guarantees granted by this Convention. This extensive scope of application is nevertheless mitigated by the fact that it only applies to civilian detainees. See also for prisoners of war, Art 12(2) of GC III.

Article 45(6) of GC IV.


UN Doc A/RES/39/169 (1994). Since then, the General Assembly has constantly referred to voluntary repatriation as ‘the preferred solution’ by contrast to the other possible solutions provided by local integration or resettlement in a third country. See also among the numerous and somewhat repetitive Excom Conclusions Nos: 109 (LXI) (2009), preambular § 16; 108 (LIX) (2008), (l); 104 (LVI) (2005), preambular § 1; 101 (LV) (2004), preambular § 5; 95 (LIV) (2003), (i); 90 (LII) (2001), (j); 87 (L) (1999), (r); 85 (XLIX) (1998), (g); 81 (XLVIII) (1997), (q); 79 (XLVII) (1996), (q); 74 (XIV), 1994 (v).

Articles 8(c) and 9 of UNHCR Statute.


Refugees lawfully established in the territories of states parties are notably thus entitled to access to courts (Art 16), the right to work (Art 17), access to public education (Art 22), and the right to social security (Art 24).

Article 34.

Zieck (n 110), 101–2.

Hathaway (n 49), 918–19.


Article 12(4) of ICCPR; Art 5 of CERD; Art 2 of the 1973 Convention on the Suppression and Punishment of the Crime of Apartheid; Art 10(2) of the 1989 Convention on the Rights
of the Child; Art 3(2) of the 1963 Protocol No 4 to the ECHR; Art 22(5) of ACHR; Art 12(2) of ACHPR; and Art 27(a) of the Arab Charter.

117 *General Comment No 27* (n 69), § 19.

118 See UNHCR, *Handbook on Voluntary Repatriation* (Geneva: UNHCR, 1996), § 2.1 considering the right to return as ‘the basic principle underlying voluntary repatriation’. For further discussions, see: Chetail (n 110), and the bibliographical references mentioned therein.


122 This provision curiously contrasts with the legal regime applicable during armed conflicts for, according to Art 109(3) of GC III, ‘no sick or injured prisoner of war […] may be repatriated against his will during hostilities’.

123 Commentary GC IV, 542.

124 Commentary CG III, 542.

125 Article 7 of GC III.

126 ‘The High Contracting Parties shall endeavour, upon the close of hostilities or occupation, to ensure the return of all internees to their last place of residence, or to facilitate their repatriation.’

127 Customary International Humanitarian Law, Rule 128.

128 Customary International Humanitarian Law, Rule 128; see Art 85(4)(b) of AP I.

129 Jaquemet (n 2), 663–4.


132 Commentary GC III, 546–7: ‘1. Prisoners of war have an inalienable right to be repatriated once active hostilities have ceased. […] 2. No exception may be made to this rule unless there are serious reasons for fearing that a prisoner of war who is himself opposed to being repatriated may, after his repatriation, be subject of unjust measures afflicting his life or liberty, especially on grounds of race, social class, religion or political views, and that consequently repatriation would be contrary to the general principles of international law for the protection of the human being. Each case must be examined individually.’ The ICRC has taken action according to these principles in a number of conflicts, including the Iran-Iraq eight years conflict (20 ICRC Annual Report 1989, 87), the

133 See Rule 128.


136 Kälin (n 2), 637.

137 Prosecutor v Furundžija, Trial Judgment, Case No IT-95-17/1, 10 December 1998, § 183.


139 Arendt (n 138), 294–5.